ORAL ARGUMENT HELD APRIL 12, 2016

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PHH CORPORATION, PHH MORTGAGE CORPORATION, PHH HOME LOANS, LLC, ATRIUM INSURANCE CORPORATION, and ATRIUM REINSURANCE CORPORATION, Petitioners, v. CONSUMER FINANCIAL PROTECTION BUREAU, Respondent.	Case No. 15-1177

PETITIONERS' RESPONSE TO MOTIONS OF CURRENT AND FORMER MEMBERS OF CONGRESS AND AMERICANS FOR FINANCIAL REFORM ET AL. FOR AN INVITATION TO FILE BRIEFS AS AMICI CURIAE IN SUPPORT OF PETITION FOR REHEARING EN BANC

Twenty-one current and former members of Congress and Americans for Financial Reform ("AFR") and associated entities (collectively, "Movants") have filed motions for an invitation to file amici curiae briefs in support of the Consumer Financial Protection Bureau's ("CFPB") petition for rehearing en banc. Movants simultaneously submitted their proposed amicus briefs to the Court.

Petitioners ("PHH") take no position on the question whether the Court should invite amicus briefs on the rehearing petition and thus on the merits of the motions themselves. However, the submission of the briefs together with the motions appears to conflict with the plain language of Circuit Rule 35(f), which expressly provides that "[n]o amicus curiae brief in response to or in support of a petition for rehearing en banc will be *received* by the clerk except by invitation of the court."[1] (Emphasis added). That rule seems to prohibit a party from submitting an amicus brief concerning rehearing unless the Court has invited one. And allowing potential amici to submit such briefs prior to an invitation undermines the purpose of the Rule, which is meant to prevent burdening the Court with unnecessary amicus briefs at the petition for rehearing stage, to obviate the need for additional pages or filings by the parties to address the arguments of amici, and to promote certainty in the briefing schedule. The Court has, however, granted such motions in the past and ordered the filing of amicus briefs in cases where no party raised the applicability of the Rule.

Accordingly, PHH respectfully requests that the Court clarify whether Rule 35(f) permits the submission of amicus briefs at the rehearing stage in this manner.

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[1] Proposed amendments to the Federal Rules of Appellate Procedure, which will likely take effect December 1, 2016, allow an amicus to file its proposed brief in response to a petition for rehearing together with a motion for leave to file. *See* Proposed Amendments to the Federal Rules of Appellate Procedure Rule 29(b), *available at* http://www.uscourts.gov/file/19848/download. But that proposal does not apply if "a local rule or order in a case provides otherwise," *ibid.*, and this Court's proposed revisions to Circuit Rule 29 include an explicit cross-reference to Circuit Rule 35(f)'s present requirement that amici briefs not be "received . . . except by invitation of the court," *see* Proposed Revision to Circuit Rule 29, *available at* https://www.cadc.uscourts.gov/internet/home.nsf/Content/+Circuit+Rules+Proposed+Amendments.

Clarification would be particularly beneficial here, where 17 amici filed a total of 6 briefs in support of PHH at the panel stage. If the Court allows the submissions of Movants, who did not participate at the panel stage, other potential amici (including members of Congress who *opposed* the Dodd-Frank Act and the creation of the CFPB) may emerge.

In all events, the Court need not invite or accept for filing briefs that are redundant of the CFPB's petition or of the amicus brief that the Court has invited from the Solicitor General.

Dated: November 29, 2016

Respectfully submitted,

/s/ Theodore B. Olson

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CERTIFICATE OF SERVICE

I hereby certify that, on November 29, 2016, an electronic copy of the foregoing response was filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the Court's CM/ECF system and was served electronically by the Notice of Docket Activity upon all counsel of record.

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